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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISRAEL HERNANDEZ,

Defendant and Appellant.

B203811

(Los Angeles County  
Super. Ct. No. SA062021)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Anthony D. Zinnanti, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Israel Hernandez appeals from the judgment entered following a jury trial that resulted in his conviction for inflicting corporal injury upon his child's parent. Hernandez was sentenced to a prison term of eight years. He contends the trial court committed *Blakely/Cunningham* error<sup>1</sup> by imposing an upper term sentence. We disagree, and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Facts.*

Hernandez and Karla B. were involved in a romantic relationship, and had three children together. In September 2006, Hernandez, after insinuating that Karla had been unfaithful, beat, kicked, and stomped Karla when she refused to have sexual relations with him.<sup>2</sup>

### 2. *Procedure.*

Trial was by jury. Hernandez was convicted of inflicting corporal injury upon a spouse, cohabitant, or child's parent (Pen. Code, § 273.5, subd. (a)).<sup>3</sup> He was acquitted of forcible rape and forcible oral copulation. In a bifurcated proceeding, the trial court found Hernandez had suffered a prior "strike" conviction and had served a prior prison term within the meaning of section 667.5, subdivision (b). Hernandez's *Romero* motion was denied.<sup>4</sup> The trial court sentenced Hernandez to a prison term of eight years. It imposed a restitution fine, a suspended parole restitution fine, and a court security assessment. Hernandez appeals.

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<sup>1</sup> *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296.

<sup>2</sup> Because the evidentiary details underlying the offense are not directly relevant to the issues presented on appeal, we do not recite them here.

<sup>3</sup> All further undesignated statutory references are to the Penal Code.

<sup>4</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

## DISCUSSION

*Imposition of an upper term sentence did not violate Hernandez's jury trial or due process rights.*

a. *Additional facts.*

At sentencing, the trial court indicated it was imposing the upper term of four years, doubled pursuant to the Three Strikes law.<sup>5</sup> The court explained it selected the upper term because Hernandez had suffered prior convictions and sustained juvenile petitions, which were numerous and increasing in seriousness; he had served a prior prison term; and he had been on parole at the time he committed the instant crime. The trial court expressly stated it did not consider any facts related to the counts on which Hernandez was acquitted, finding them “irrelevant to the inquiry.”

b. *Discussion.*

Hernandez argues that, because the court imposed the upper term based on facts that were neither admitted nor found true by a jury, imposition of the upper term violated his Fifth, Sixth and Fourteenth Amendment rights to a jury trial and due process. (*Blakely v. Washington*, *supra*, 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Cunningham v. California*, *supra*, 549 U.S. 270.) We discern no error.

(i) *Applicable legal principles.*

In *Apprendi v. New Jersey*, *supra*, 530 U.S. at page 490, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. In *Cunningham*, the Court held that the version of California's determinate sentencing law (DSL) then in effect violated a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments by assigning to the trial judge, rather than the jury, the authority to make factual findings that subject a defendant to the possibility of an upper term sentence. (*Cunningham v.*

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<sup>5</sup>

The trial court struck the one-year section 667.5, subdivision (b) prison term enhancement because it was using the fact Hernandez had served a prior prison term as an aggravating factor.

*California, supra*, 549 U.S. at pp. 292-293; *People v. Black* (2007) 41 Cal.4th 799, 805 (*Black II*); *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832.)

In *Black II*, our Supreme Court clarified that “if a single aggravating factor has been established in a manner consistent with *Blakely* and *Cunningham* – by the jury’s verdict, the defendant’s admissions, or the fact of a prior conviction – the imposition by the trial court of the upper term does not violate the defendant’s Sixth Amendment right to a jury trial, regardless of whether the trial court considered other aggravating circumstances in deciding to impose the upper term. ‘[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.’ [Citation.]” (*People v. Towne* (2008) 44 Cal.4th 63, 75, citing *Black II, supra*, 41 Cal.4th at p. 813.)

Further, *Black II* held that the right to a jury trial does not apply to the determination that the defendant’s prior convictions are numerous or of increasing seriousness. (*Black II, supra*, 41 Cal.4th at pp. 818-820; *People v. Towne, supra*, 44 Cal.4th at p. 75.) More recently, our Supreme Court has clarified that the right to a jury trial likewise does not extend to the determination of the aggravating circumstances that the defendant was on probation or parole at the time of the offense, or has served a prior prison term. (*People v. Towne, supra*, at p. 79.)

In the wake of *Cunningham*, “[t]he California Legislature quickly responded” by amending the law to rectify the constitutional defects identified in *Cunningham*. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) “Senate Bill No. 40 (2007–2008 Reg. Sess.) (Senate Bill 40) amended section 1170 in response to *Cunningham*’s suggestion that California could comply with the federal jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term. [Citations.] Senate Bill 40 amended section

1170 so that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states. As amended, section 1170 now provides as pertinent: ‘When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . .’ (§ 1170, subd. (b).) This amended version of section 1170 became effective on March 30, 2007. (Stats. 2007, ch. 3, § 2.)” (*People v. Wilson, supra*, at p. 992.)

(ii) *Imposition of the upper term was proper.*

The People argue that Senate Bill 40’s amendment to the DSL cured the constitutional defects identified by *Cunningham*. Because the amended version of the statute was in effect when Hernandez was sentenced, they posit, *Cunningham* is inapplicable and imposition of the upper term was constitutionally sound. The People appear to be correct. Hernandez was sentenced on November 5, 2007, after the amendment’s effective date. The court stated its reasons for imposition of the upper term, as described above. Accordingly, “[t]he trial court’s sentencing of defendant in compliance with the requirements of amended section 1170, subdivision (b), did not violate defendant’s federal constitutional rights under *Apprendi*, *Blakely*, and *Cunningham*.” (*People v. Wilson, supra*, 164 Cal.App.4th at p. 992.)

Hernandez argues that ex post facto principles prohibit application of the amended version of the DSL to him, because he committed the crime prior to the statute’s amendment. We need not reach this question, however, because even assuming Hernandez is correct, there was clearly no *Blakely/Cunningham* error. All three aggravating factors cited by the trial court were constitutionally permissible under *Cunningham*.

Hernandez's probation report shows that he had suffered sustained juvenile petitions for assault with a deadly weapon or by means likely to produce great bodily injury (§ 245, subd. (a)(1)), burglary (§ 459), receiving stolen property (§ 496, subd. (a)), and sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). He further suffered two convictions as an adult for robbery (§ 211). As noted, imposition of an upper term sentence is permissible under *Cunningham* when based upon the aggravating circumstance of the defendant's criminal history, including the circumstance that the convictions are numerous or of increasing seriousness. (*People v. Towne*, *supra*, 44 Cal.4th at p. 75; *People v. Wilson* (2008) 44 Cal.4th 758, 811-812; *Black II*, *supra*, 41 Cal.4th at pp. 819-820; Cal. Rules of Court, rule 4.421(b)(2).) His six prior convictions and juvenile adjudications are clearly numerous. The probation report further substantiates that Hernandez was on parole at the time he committed the instant crime, and had served a prior prison term. These circumstances likewise fall within the recidivism exception to *Cunningham*'s jury trial requirement. (*People v. Towne*, *supra*, at p. 79.) Because Hernandez's criminal history established aggravating circumstances that independently satisfied Sixth Amendment requirements and rendered him eligible for the upper term, he was not legally entitled to the middle term and his right to a jury trial was not violated. (*Black II*, *supra*, at p. 820; *People v. Wilson*, *supra*, at p. 812.)

Hernandez offers several theories in support of his contrary argument, none persuasive. First, he urges that a prior juvenile adjudication cannot be considered as a factor in aggravation. In Hernandez's view, the primary justification for the recidivism exception is that prior convictions have already been found true by a jury, beyond a reasonable doubt. Because jury trials are not held in juvenile proceedings this analysis does not apply, and juvenile adjudications do not fall within the recidivism exception.

We are not convinced that a prior juvenile adjudication cannot be considered as a factor in aggravation without a jury finding. Courts have recognized that a juvenile adjudication may be used to subject a defendant to sentencing under the Three Strikes law without running afoul of *Apprendi*. (*People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1313-1316; *People v. Smith* (2003) 110

Cal.App.4th 1072, 1075; *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394.) Pending further guidance from our Supreme Court,<sup>6</sup> we find the reasoning in these cases persuasive. But assuming arguendo Hernandez is correct, no *Blakely/Cunningham* error is apparent in any event. Even taking the juvenile adjudications out of the equation, the trial court still relied upon *two* other constitutionally permissible factors in imposing the upper term sentence, i.e., that Hernandez was on parole at the time of the crime and had served a prior prison term. (*People v. Towne, supra*, 44 Cal.4th at p. 79.) Imposition of an upper term sentence “does not infringe upon the defendant’s constitutional right to jury trial so long as one legally sufficient aggravating circumstance . . . is justified based upon the defendant’s record of prior convictions.” (*Black II, supra*, 41 Cal.4th at p. 816.)

Next, Hernandez argues that the trial court’s “use of both constitutionally valid and other aggravating factors” was constitutionally impermissible. As we have discussed, the trial court did not rely upon any constitutionally impermissible factors. All factors it cited as the basis for its selection of the upper term fell within the recidivism exception. Further, *Black II* made abundantly clear that a trial court does not commit *Blakely/Cunningham* error by considering a variety of aggravating factors, as long as one constitutionally permissible aggravating factor exists. “*Cunningham* and its antecedents do not prohibit a judge from making the factual findings that lead to the selection of a particular sentence.” (*Black II, supra*, 41 Cal.4th at p. 814.) “[T]he presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence. [Citations.] The court’s factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the

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<sup>6</sup> The question of whether a prior juvenile adjudication can subject a defendant to sentencing under the Three Strikes law is currently pending before our Supreme Court (*People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted Oct. 10, 2007, S154847), as is the related question presented here, i.e., whether a defendant’s prior juvenile adjudications can be considered as an aggravating factor for purposes of imposing an upper term sentence. (*People v. Tu* (2007) 154 Cal.App.4th 735, review granted Dec. 12, 2007, S156995; *People v. Grayson* (2007) 155 Cal.App.4th 1059, review granted Dec. 19, 2007, S157952.)

upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial factfinding on those additional aggravating circumstances is not unconstitutional.” (*Id.* at p. 815.)<sup>7</sup>

In a variation on the same theme, Hernandez urges that the trial court’s imposition of the upper term “failed to comport with *Black II*’s two step sentencing protocol for imposition of the high term.” He theorizes that *Black II* mandated a “bifurcated,” “two step” procedure in which the trial court must first identify a constitutionally valid aggravating factor, and then articulate whether that factor alone justifies imposition of the high term. In support of this theory, Hernandez points to the following language from *Black II*: “*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California’s current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court’s exercise of its discretion in selecting the appropriate term from among those authorized for the defendant’s offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently.” (*Black II, supra*, 41 Cal.4th at pp. 815-816.)

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<sup>7</sup> Hernandez argues that *Black II* was incorrectly decided. He also posits that *Black II*’s conclusion that one constitutional aggravating factor is sufficient to make a defendant eligible for the upper term is an “untenable interpretation of the Determinate Sentencing Law.” According to Hernandez, *Black II*’s interpretation established “a new, unexpected[,] . . . bifurcated sentencing scheme” that cannot be applied to him without violating ex post facto principles. As Hernandez recognizes, however, we are bound by *Black II* and necessarily reject these arguments. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)



We do not read the cited language from *Black II* as mandating the result argued by Hernandez. Hernandez ignores that immediately following the quoted language, *Black II* explained, “Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. *It follows that imposition of the upper term does not infringe upon the defendant’s constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant’s record of prior convictions.*” (*Black II, supra*, 41 Cal.4th at p. 816, italics added.) Hernandez’s argument, distilled to its essence, is that to comply with *Cunningham*, a trial court can impose an upper term sentence only when it relies upon a constitutionally permissible factor as the sole basis for its selection. This is simply another way of restating Hernandez’s earlier argument that a court may not consider a “mix” of factors, i.e., some requiring a jury finding and some not. As we have explained, that argument was rejected in *Black II*.

**DISPOSITION**

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.